United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 22, 2005

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Chukchansi Gold Resort & Casino 177-1683
Cases 32-CA-22081, 32-CA-22120 220-7567-7000
240-0150
240-3300
240-5000
530-8006

The Region submitted this case for advice on whether certain jurisdictional defenses raised by an Indian gaming casino preclude application of the Board's decision in San Manuel Indian Bingo & Casino, which holds that the NLRA applies to such enterprises.[1] We conclude that there is no merit to those defenses and that the Board should assert jurisdiction over these cases.

FACTS

The Picayune Rancheria of Chukchansi Indians (the Tribe) is a federally recognized Indian tribe that owns and operates the Chukchansi Gold Resort & Casino in Madera County, California.[2] The casino is located within the Tribe's reservation, on fee land owned by the Tribe. In early 2001, UNITE/HERE Local 19 (the Union) expressed an interest in organizing the Tribe's casino employees. These cases arise out of that organizing activity, and address the Tribe's assertion that the Board has no jurisdiction over the pending representation and unfair labor practice cases.

A. The Tribal-State Compact and Its Provision for a Tribal Labor Relations Ordinance

The Indian Gaming Regulatory Act of 1988 ("IGRA") provides a statutory framework for federally recognized Indian tribes to operate lucrative class III gaming facilities — i.e., casinos — on their lands.[3] Before

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[1] 341 NLRB No. 138 (May 28, 2004).

[2] The Tribe created the Chukchansi Economic Development Authority, an asserted governmental arm of the Tribal Council, to direct casino operations.

[3] 25 U.S.C. §§ 2701-2721.

commencing such operations, a tribe must negotiate a compact with the state in which it is located and plans to operate.[4] These tribal-state compacts may include provisions relating to any of six specifically enumerated subjects as well as "any other subjects that are directly related to the operation of gaming activities."[5] Upon the completion of successful negotiations, the compact must be submitted to the U.S. Secretary of the Interior for approval. After the Secretary provides notice of approval in the Federal Register, the tribe can lawfully engage in class III gaming activities.[6] Nothing in the IGRA explicitly covers labor relations and the subject of labor relations is not one of the six subjects specifically denominated as appropriate topics for a tribal-state gaming compact.

During negotiations for a tribal-state compact in 1999, the State of California insisted that any gaming compact include a provision requiring the Tribe to adopt an agreement or other procedure protecting the organizational and representational rights of all casino employees and related workers.[7] The State suggested that the tribes work directly with union representatives to decide how they might meet the concerns of organized labor. In late summer 1999, the state concluded negotiations with several tribes on a model compact. On or about September 10, 1999, the Tribe, as did some 57 other tribes, entered a compact with California, which permitted it to conduct gaming on Indian lands.[8]

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[4] See 25 U.S.C. § 2710(d)(1)(C) ("Class III gaming activities [e.g., casinos] shall be lawful on Indian lands only if such activities are conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . .").

[5] 25 U.S.C. § 2710(d)(3)(C)(vii).

[6] See 25 U.S.C. § 2710(d)(3)(B).

[7] The following background information concerning the California state compact is derived from the Ninth Circuit decision in In re Indian Gaming Related Cases, 331 F.3d 1094, 1102 (2003), cert. denied sub nom. Coyote Valley Band of Pomo Indians v. California, 540 U.S. 1179 (2004), which provides a thorough summary of the events leading to Indian gaming in California.

[8] The Tribe refused to provide the Region with a copy of the tribal-state compact, however the Division of Advice obtained a copy from the U.S. Department of the Interior.

Section 10.7 of the Tribe's compact is entitled "Labor Relations." Among other things, Section 10.7 provides that the compact would be null and void if,

> on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise . . . .

On or about October 1, 1999, the Tribe informed California that it had adopted, pursuant to Section 10.7 of the compact, the model Tribal Labor Relations Ordinance (TLRO) that had been negotiated by California tribes and labor representatives.[9] The TLRO provides for certification and decertification procedures, contains a provision similar to Section 7 of the NLRA, and outlines specific unfair labor practices, including provisions similar to Section 8(a)(1), (2), (4), and (5) of the NLRA.[10] The TLRO requires resolution of all labor disputes by a "binding dispute resolution mechanism." The first level of dispute resolution requires "appeal to a designated tribal forum such as a Tribal Council, Business Committee, or Grievance Board."[11] The second level requires resolution by the "Tribal Labor Panel, consisting of ten arbitrators appointed by mutual selection of the parties which shall serve all

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[9] All California-based Indian tribes presently engaged in lawful class III gaming operations have agreed to a compact containing the labor relations provision and have enacted the TLRO or a substantially similar variant.

[10] The TLRO provides limited organizational rights to workers at tribal gaming establishments and related facilities that employ 250 or more employees. These rights include union access to eligible employees in break rooms and locker rooms during non-work time, as well as the right to engage in collective bargaining if the union becomes the exclusive collective bargaining representative by winning an election. The TLRO also contains several provisions that protect tribal interests. For example, it guarantees tribal gaming establishments the right to grant employment preferences to Native Americans, places strict limits upon a union's right to strike, and completely prohibits picketing on Indian lands. See In re Indian Gaming Related Cases, 331 F.3d at 1106.

[11] TLRO § 13(b).

tribes that have adopted [the] ordinance."[12] At this level, the parties select one arbitrator from the Tribal Labor Panel or, if either party objects to the selection, a three-member panel is utilized. The third, and final, level of dispute resolution occurs when one of the parties petitions a Tribal Court to compel arbitration or confirm an arbitration award.[13] The decision of the Tribal Court can be appealed to federal district court or, if the federal district court declines jurisdiction, to the appropriate California superior court.

On May 5, 2000, the Secretary of the Interior approved the Tribe's compact with the State of California, which included the TLRO.[14]

B. The Union's Organizing Activity at the Casino

In February 2001, the Tribe and the Union entered into a neutrality/card check agreement. The agreement provided for, among other things, Tribe neutrality during an organizing campaign, Union access to the premises, and Union recognition after verification by an arbitrator that the Union had obtained signed authorization cards from a majority of the unit employees. It also included a dispute resolution procedure to be utilized after recognition in the event the parties could not agree on a contract within a specified period of time. Various provisions of the agreement referred to the TLRO.[15] The agreement was effective from the date of signing to five years after the casino opened.

In late June 2003, the Tribe opened the casino.[16] The casino employs both Indians and non-Indians and most of its customers are non-Indian. By November 2004, the Union

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[12] TLRO § 13(c).

[13] TLRO § 13(d).

[14] See 65 Fed. Reg. 31,189 (May 16, 2000).

[15] For example, the agreement states it was executed to ensure an "orderly environment for the exercise by the Employees of their rights under the [TLRO]." Also, the agreement's different dispute resolution provisions incorporated various elements of the TLRO's binding dispute resolution mechanism.

[16] Although the Region states that the casino opened in 2004, the Tribe states, and newspaper articles show, that the casino opened in 2003.

believed it had acquired a sufficient number of cards to request verification of its majority status. An arbitrator held a hearing that was attended by the Union, the Tribe, and casino employee James Terrazas. The Union presented its cards and Terrazas presented about 40 signatures from unit employees who opposed the Union. On November 22, 2004, the arbitrator issued a decision certifying the Union as the exclusive collective bargaining representative of a unit of about 680 employees. By letter dated December 5, 2004, the Union requested that contract negotiations begin.

On May 23, 2005, Terrazas filed a decertification petition in Case 32-RD-1482.[17] The Region believed that Terrazas had not provided a sufficient number of signed cards to support the petition, but it could not reach a definite conclusion because the Tribe refused to provide a list of the casino's current employees.[18] The Region issued a subpoena for the employee list, but the Tribe filed a motion to quash asserting that the Board lacks jurisdiction over the casino.

On May 26, 2005, the Union filed a charge in Case 32-CA-22081 alleging that the Tribe had violated Section 8(a)(1) by maintaining several unlawful work rules in its employee handbook. The Region concluded that several handbook rules, including the prohibition against wearing unauthorized buttons or pins, were unlawful. On June 17, 2005, Terrazas filed a charge in Case 32-CA-22120 alleging that the Tribe had violated the Act by maintaining unlawful work rules in its employee handbook and by discriminatorily enforcing those rules against him, but not the Union. The Region found unlawful the same rules covered by the Union's charge. The Region also found the Tribe had discriminatorily enforced the unauthorized button rule against Terrazas and that it had unlawfully prohibited Terrazas from distributing anti-Union literature in the employee lunchroom, even though the handbook permitted such activity.

The Region is prepared to dismiss Terrazas' RD petition. Although the Region has given him the opportunity to rebut the accuracy of the employee list submitted by the Union, Terrazas has been unable to do so. According to that employee list, Terrazas is far from establishing the 30% showing of interest needed to support the RD petition.

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[17] Terrazas is represented by the National Right to Work Legal Defense Foundation.

[18] The Union provided the Region with an employee list that originated with the Tribe and appeared to be accurate.

During the summer of 2005, the Tribe and the Union negotiated a collective bargaining agreement that was ratified by the unit employees.

The Tribe asserts that the Board does not have jurisdiction over the casino and, on that basis, it refuses to provide any response on the merits of the unfair labor practice charges.

ACTION

We conclude that the Board should assert jurisdiction over the Tribe's casino operations, because this case is nearly identical to San Manuel, where the Board held that it has statutory jurisdiction over Indian casinos on Indian lands. Moreover, there is no merit to any of the Tribe's arguments that the Board lacks jurisdiction.

I. THE BOARD'S DECISION IN *SAN MANUEL* COMPELS ASSERTION OF JURISDICTION OVER THE TRIBE'S CASINO

As in the current case, San Manuel Indian Bingo & Casino involved an Indian tribe that had opened a casino on Indian lands within California.[19] That casino employed Indians and non-Indians and most of its customers were non-Indians. The San Manuel tribe also had adopted the model TLRO present here.[20] It then granted access rights to one union for organizing purposes but denied the same to a second union. The second union filed a Section 8(a)(2) charge against the casino alleging unlawful assistance. The San Manuel tribe defended against the charge by asserting that the Board did not have jurisdiction over Indian casinos on Indian lands.

In San Manuel, the Board adopted a new standard for determining whether it has jurisdiction over enterprises associated with Indian tribes. The Board first held that the NLRA is a statute of general application and that it applies to Indian tribes because in Federal Power Commission v. Tuscarora Indian Nation,[21] the Supreme Court stated "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[22] It then held that

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[19] 341 NLRB No. 138, slip op. at 1-2.

[20] Id., slip op. at 2, 11.

[21] 362 U.S. 99, 116 (1960).

[22] 341 NLRB No. 138, slip op. at 5, 9.

there are certain exceptions, set forth in Donovan v. Coeur d'Alene Tribal Farm,[23] that dictate when a statute of general applicability should not apply to the conduct of Indian tribes.[24] Those exceptions are when:

> (1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.[25]

If none of the exceptions applies, "the final step in the Board's analysis is to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction."[26] The purpose of this final step "is to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture."[27]

Applying this new approach, the Board asserted statutory jurisdiction over the San Manuel Indian Casino. It first held that none of the Coeur d'Alene exceptions applied. Regarding the first exception, the Board concluded that the tribe's operation of a casino was not an exercise of self-governance or a purely intramural matter. Intramural matters only involve topics such as "tribal membership, inheritance rules, and domestic relations."[28] The casino, which employed many non-Indians and had non-Indian customers, was a typical commercial enterprise operating in and substantially affecting interstate commerce and, therefore, fell outside the listed intramural matters. The second exception was inapplicable because the San Manuel tribe was not party to any treaty.[29] The third exception

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[23] 751 F.2d 1113 (9th Cir. 1985).

[24] 341 NLRB No. 138, slip op. at 5, 6.

[25] Id., slip op. at 5 (quoting Coeur d'Alene, 751 F.2d at 1115).

[26] Id., slip op. at 8.

[27] Id.

[28] Id., slip op. at 9 (quoting Coeur d'Alene, 751 F.2d at 1116). See also Montana v. United States, 450 U.S. 544, 564 (1981).

[29] Id.

was inapplicable because neither the language nor the legislative history of the Act showed that Congress wanted to exclude Indians from Board jurisdiction.[30] Finally, the Board held that policy considerations did not preclude it from exercising its discretionary jurisdiction. The Board reiterated that the casino was a typical commercial enterprise that employed non-Indians and catered to non-Indian customers. Thus, Board regulation of the casino's labor relations would not interfere with the tribe's autonomy or its ability to regulate intramural matters.[31]

Based on San Manuel, the Board has jurisdiction over the Tribe's casino here. The pertinent facts are virtually identical. The Tribe entered a tribal-state compact to operate a casino on its lands, the Tribe adopted the same TLRO, the Tribe employs Indians and non-Indians at the casino, and most of the casino's customers are non-Indians. Absent a meritorious defense not presented to the Board in San Manuel, there is no reason to decline jurisdiction here.

II. THE TRIBE'S JURISDICTIONAL DEFENSES LACK MERIT

The Tribe makes the following arguments against the Board asserting jurisdiction here: (1) this Indian casino falls within the second Coeur d'Alene exception, (2) the doctrine of exhaustion of tribal remedies requires the Board to defer to the binding dispute resolution mechanism established by the TLRO, (3) the Board should either cede jurisdiction under Section 10(a) to the Tribal Labor Panel or use its discretion under Section 14(c)(1) to decline jurisdiction, and (4) because the TLRO provides an alternative dispute resolution process, the Board should defer to that process as provided in Collyer.[32] We conclude that there is no merit to any of these arguments.[33]

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[30] Id.

[31] Id. After deciding to assert jurisdiction, the Board remanded San Manuel for a hearing on the merits. In a subsequent decision, ruling on a summary judgment motion, the Board found that the San Manuel tribe violated Section 8(a)(2) by granting only one union access to its premises. See 345 NLRB No. 79 (September 30, 2005). On October 6, 2005, the San Manuel tribe filed a petition for review in the D.C. Circuit (No. 05-1392). The Board subsequently filed a cross-application for enforcement (No. 05-1432).

[32] Collyer Insulated Wire, 192 NLRB 837, 841-842 (1971).

[33] The Tribe raises several other jurisdictional defenses. Because those defenses were already presented to and

A. This Indian Casino Does Not Fall Within the Second *Coeur d'Alene* Exception

The Tribe asserts that the application of the Act to its Indian casino would abrogate treaty rights. Initially, the Tribe concedes that it is not covered by a treaty. Thus, just as in San Manuel, there can be no abrogation of treaty rights here.[34]

Nevertheless, the Tribe contends that the Board's assertion of jurisdiction here would abrogate rights equal to treaty rights because the federal government already has agreed to let the Tribe regulate labor relations at the casino. The Tribe bases its argument on the fact that the U.S. Secretary of the Interior, pursuant to the scheme established by the IGRA, approved the tribal-state compact that included the TLRO. The Tribe notes that the Secretary could not have approved the compact, including the TLRO, if it violated any provision of Federal law.[35] Thus, the Tribe asserts that by entering the compact, "the tribe and the state have opted out of the NLRA" and that "when the Secretary . . . approved the Tribe's compact, the federal government, in effect, consented to the alternative labor approach [i.e., the TLRO] in lieu of applying the NLRA. Therefore, if the Board asserts jurisdiction and seeks to impose the NLRA on the Tribe, the resulting effect would be an abrogation of the Tribe's right to make its own labor related decisions associated with the exclusive right to conduct gaming activities."

The Tribe's reliance on the Secretary of the Interior's approval of the tribal-state compact to preclude Board jurisdiction is misplaced for several reasons. First, the Tribe's argument incorrectly presumes that the IGRA's compact mechanism gives states and tribes complete freedom to "opt[] out of" or circumvent federal laws that would otherwise apply to tribal casinos. If that presumption were correct, the text of the IGRA or its legislative history would have explicitly provided for that capability. Yet, the Tribe cites no legal authority to support its presumption and we have not been able to locate any.

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discussed by the Board in San Manuel, they will not be considered here.

[34] See 341 NLRB No. 138, slip op. at 9.

[35] See 25 U.S.C. § 2710(d)(8)(B).

Rather, the congressional purpose underlying the IGRA establishes that a Secretary-approved compact cannot be used to preclude Board jurisdiction. Congress passed the IGRA to preempt state regulation of Indian gaming.[36] Only through compact negotiations can states seek to regulate those aspects of tribal gaming that might affect "legitimate State interests."[37] After the Board decided in San Manuel that the NLRA applied to Indian casinos, "legitimate state interests" could not include the regulation of labor relations affecting interstate commerce because it is well-established that the NLRA preempts such state regulation.[38] In other words, once the Board validly asserts jurisdiction, any state or local system of labor relations that governs the same employers or employees must yield.[39] Thus, because Congress included the compacting mechanism in the IGRA only to account for limited state interests related to Indian gaming, the terms of a compact cannot interfere with the Board's decision to assert jurisdiction over Indian casinos.[40]

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[36] S. Rep. No. 100-446, at 5-6 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76. See also San Manuel Indian Bingo & Casino, 341 NLRB No. 138, slip op. at 10.

[37] In re Indian Gaming Related Cases, 331 F.3d at 1097. See also S. Rep. No. 100-446, at 6 (1988), as reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76 (tribal-state compacts are the only method by which a "tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land. . . . In no instance, does [the IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.").

[38] See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-243, 244 (1959); Machinists Lodge 76 v. Employment Relations Commn., 427 U.S. 132, 150-151 (1976).

[39] See, e.g., Bethlehem Steel Co. v. N. Y. State Labor Relations Board, 330 U.S. 767, 773-774, 776 (1947); Garner v. Teamsters Local 776, 346 U.S. 485, 490-491 (1953).

[40] In June 2003, almost a year before the Board issued its San Manuel decision, the Ninth Circuit decided In re Indian Gaming Related Cases, 331 F.3d at 1115-16. There, the court held that California did not violate the IGRA's requirement of good-faith bargaining over compacts by insisting that Indian tribes include the labor relations provision (i.e., Section 10.7) or the model TLRO in their tribal-state compacts. The court held that labor relations was an appropriate topic for compact negotiations because the IGRA stated that compacts could cover "any other subjects that

Second, the fact that Board jurisdiction must be explicitly, not implicitly, limited significantly diminishes the force of the Tribe's "secretarial approval" argument. Section 10(a) of the Act establishes the Board as the exclusive federal agency empowered to prevent unfair labor practices and further provides that this power shall not be limited by "agreement, law, or otherwise."[41] Nevertheless, the Tribe argues that its tribal-state gaming compact has ousted the Board of its jurisdiction. To accept that argument, one would have to read the IGRA as containing an implicit repeal of Section 10(a). However, as the Supreme Court has stated, "[i]t is a familiar doctrine that repeals by implication are not favored."[42]

Finally, the Tribe's "secretarial approval" argument is undermined by the facts of this case. The Secretary approved the compact in May 2000, when Board precedent stated that the NLRA did not apply to tribal commercial enterprises located on reservation land. It was not until May 2004 that the Board in San Manuel extended the NLRA's coverage to on-reservation tribal enterprises. In light of this chronology, the Secretary was never presented with the issue of whether the NLRA or the TLRO should control and, therefore, could not have concluded that the TLRO would trump the NLRA. Accordingly, there is no basis for the Tribe's argument that the federal government has already agreed, through the Secretary's approval of the compact, to not apply the NLRA to this casino.

B. Board Jurisdiction Is Not Precluded by the Doctrine of Exhaustion of Tribal Remedies

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are directly related to the operation of gaming activities." Id. at 1116. The court's view regarding labor relations provisions in a tribal-state compact has no effect on the issue of Board jurisdiction because that case was decided when the Board was not asserting jurisdiction over tribal enterprises on Indian lands and neither the court nor the parties appear to have considered the issue.

[41] See, e.g., Guss v. Utah Labor Relations Board, 353 U.S. 1, 10 (1957).

[42] See, e.g., Pipefitters Local 562 v. United States, 407 U.S. 385, 432 n.43 (1972). Cf. Bowrin v. U.S. INS, 194 F.3d 483, 489 (4th Cir. 1999) (applying "long-standing rule disfavoring repeal of jurisdictional provisions by implication," court held federal immigration statutes did not impliedly repeal jurisdiction of federal courts over habeas corpus petitions in deportation cases).

The Tribe argues that the Board lacks jurisdiction over the RD petition and ULP charges filed here because the doctrine of exhaustion of tribal remedies requires the Board to defer to the binding dispute resolution mechanism established by the TLRO. The Tribe asserts that the first inquiry here is whether the tribal court, i.e., the Tribal Labor Panel, has subject matter jurisdiction over the case. It then relies on National Farmers Union Insurance Cos. v. Crow Tribe of Indians,[43] and Iowa Mutual Insurance Co. v. LaPlante,[44] to argue that the exhaustion of tribal remedies doctrine should apply here. As explained below, both of these assertions lack merit.

1. Supreme Court precedent does not support the Tribe's argument that the Tribal Labor Panel has subject matter jurisdiction over these cases

Contrary to the Tribe's assertion, the Supreme Court decisions in Strate v. A-1 Contractors[45] and Montana v. United States[46] do not support the argument that the Tribal Labor Panel has subject matter jurisdiction over the RD petition and ULP charges here.

In Strate and Montana, the Supreme Court was presented with situations where Indian tribes, either through adjudicatory or legislative means, exercised civil jurisdiction over the conduct of non-tribal members on non-Indian land within reservation boundaries.[47] In both cases, the Court, relying on Oliphant v. Suquamish Indian Tribe,[48] first noted that Indian tribes do not have criminal jurisdiction over non-Indians.[49] That precedent was based

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[43] 471 U.S. 845 (1985).

[44] 480 U.S. 9 (1987).

[45] 520 U.S. 438 (1997).

[46] 450 U.S. 544 (1981).

[47] Strate, 520 U.S. at 442-444 (tribal court asserted jurisdiction over personal injury action resulting from auto accident involving non-members on state highway within reservation); Montana, 450 U.S. at 549 (tribe passed ordinance prohibiting non-members from hunting or fishing on reservation, including non-Indian land).

[48] 435 U.S. 191 (1978).

[49] See Strate, 520 U.S. at 445; Montana, 450 U.S. at 565.

on the general proposition that "the inherent sovereign powers of an Indian tribe – those powers a tribe enjoys apart from express provision by treaty or statute – do not extend to the activities of nonmembers of the tribe."[50] The Court then set forth the general rule that,

> absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.[51]

The Court then prohibited the exercise of tribal civil jurisdiction in both cases because in neither case had one of the exceptions been satisfied.[52]

Here, the Tribe argues that because the Union entered the neutrality/card check agreement and Terrazas accepted employment at the casino, both parties have entered consensual relationships with the Tribe so that they are now subject to its civil jurisdiction. This argument is unavailing. It is well-established that "Indian tribes possess only a limited sovereignty that is subject to complete defeasance" by the federal government.[53] Neither Strate nor Montana involved situations where, as here, the federal government already had passed legislation that divested inherent tribal sovereignty over the relevant subject matter. In passing the NLRA, Congress has preempted the field of labor relations affecting interstate commerce and has established the Board as the exclusive tribunal for labor relations matters, thereby explicitly divesting all

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[50] Strate, 520 U.S. at 445-446. See also Montana, 450 U.S. at 564-565 ("The areas in which [the] implicit divestiture of [inherent tribal] sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.").

[51] Strate, 520 U.S. at 446. See also Montana, 450 U.S. at 564-566.

[52] Strate, 520 U.S. at 457-458; Montana, 450 U.S. at 566.

[53] Coeur d'Alene, 751 F.2d at 1115, and the cases cited therein.

other tribunals of jurisdiction.[54] As a result, it does not follow from Strate and Montana that the Tribal Labor Panel has subject matter jurisdiction over the current decertification petition and ULP charges.

2. The doctrine of exhaustion of tribal remedies does not apply here because by enacting the NLRA, Congress has preempted tribal court jurisdiction over labor relations

Even assuming that the Tribal Labor Panel has subject matter jurisdiction over the RD petition and ULP charges, the Tribe's reliance on National Farmers and Iowa Mutual, which set forth the exhaustion of tribal remedies doctrine, is unavailing.

National Farmers and Iowa Mutual involved personal injury actions brought by tribal members against at least one non-Indian defendant in tribal courts.[55] After the tribal courts issued judgments, the defendants initiated federal court litigation arguing that the tribal courts did not have jurisdiction. The Supreme Court stated that neither the federal question nor diversity statutes had automatically foreclosed whether tribal courts have subject matter jurisdiction over civil actions involving non-Indians.[56] This contrasted with criminal cases involving non-Indians because the Court previously had held that "federal legislation conferring jurisdiction on the federal courts to try non-Indians for [criminal] offenses in Indian Country had implicitly preempted tribal jurisdiction."[57]

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[54] See, e.g., Guss v. Utah Labor Relations Board, 353 U.S. at 10-11; Garner v. Teamsters Local 776, 346 U.S. at 490-491.

[55] National Farmers, 471 U.S. at 847-848 (Indian minor hit by motorcycle in school parking lot; school was located on state property within reservation); Iowa Mutual, 480 U.S. at 974 (tribal member injured while working on Indian-owned ranch within reservation).

[56] National Farmers, 471 U.S. at 855-856 (discussing federal question statute); Iowa Mutual, 480 U.S. at 17 (discussing diversity statute).

[57] National Farmers, 471 U.S. at 853-854 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. at 204 ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion . . . that Congress consistently believed this to be the necessary result of its repeated legislative actions.")); Iowa Mutual, 480 U.S. at 15.

Thus, the Court held that, in civil actions, the issue of whether a tribal court had subject matter jurisdiction had to be resolved first in the tribal court system.[58] As a result, a party disputing tribal court jurisdiction would be required to exhaust its remedies in the tribal court system before it could challenge the tribal court's assertion of jurisdiction in federal district court.[59]

The Tribe argues that the authority granted federal courts by the federal question and diversity statutes is analogous to the authority granted the Board by the NLRA. Accordingly, because the Supreme Court has held that the federal question and diversity statutes did not divest tribal courts of civil jurisdiction, it follows that the NLRA does not divest the tribe of jurisdiction over labor relations cases. The Tribe's argument does not take into account that, unlike civil actions, Congress established the Board as the exclusive tribunal for the resolution of disputes that arise under the NLRA.[60] In passing the NLRA, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . ."[61] Indeed, the Board possesses the implied authority "to enjoin state action where its federal power preempts the field."[62] This

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[58] National Farmers, 471 U.S. at 856; Iowa Mutual, 480 U.S. at 16-17.

[59] The only exceptions to the exhaustion rule occur when "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith, . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." National Farmers, 471 U.S. at 856, n.21. see also Iowa Mutual, 480 U.S. at 19, n.12.

[60] In fact, labor relations cases may fall within the second exception to the doctrine of exhaustion of tribal remedies. That exception states that exhaustion is not required where tribal jurisdiction would be "patently violative of express jurisdictional prohibitions." See National Farmers 471 U.S. at 856, n.21.

[61] San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 242 (quoting Garner v. Teamsters, 346 U.S. at 490).

[62] NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

is in contrast to civil actions over which state and federal courts possess concurrent jurisdiction, even if the claim raises a federal question.[63] Thus, the current situation is more like that in Oliphant, as construed in National Farmers, where the Court held that federal legislation had implicitly preempted tribal jurisdiction over criminal offenses committed by non-Indians on Indian land. By establishing the Board as the exclusive tribunal to hear matters covered by the NLRA, Congress similarly preempted tribal court jurisdiction over labor relations cases.[64]

C. The Board Should Not Cede Jurisdiction Under Section 10(a) of the NLRA or Decline to Assert its Discretionary Jurisdiction Under Section 14(c)(1)

The proviso to Section 10(a) of the NLRA states that

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[63] See, e.g., Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478 (1981) ("The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state court adjudication."). See generally Jack H. Friedenthal et al., Civil Procedure § 2.3, at 13 & n.23 (2d ed. 1993) ("By and large, federal court subject matter jurisdiction is concurrent with that of the courts of the various states. This means that most cases over which the federal courts have jurisdiction also can be heard in state courts.").

[64] The Tribe cites two cases for the principle that the exhaustion doctrine has been applied to employment matters. Those cases, Shannon v. Houlton Band of Maliseet Indians, 54 F. Supp.2d 35 (D. Me. 1999), and Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975), are not relevant to the issues here. They involve actions under the Indian Civil Rights Act that are to be brought before tribal forums. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64, 71 (1978); Ordinance 59 Assn. v. Babbitt, 970 F. Supp. 914, 925-926 (D. Wyo. 1997) (noting Santa Clara impliedly overruled Janis on this point), affd. 163 F.3d 1150 (10th Cir. 1998). The Tribe cites a third exhaustion case, Potaluck Corp. of Kansas v. Prarie Band of Potawatomi Indians, 2000 WL 1721797 (D. Kan. 2000), which involved a construction company bringing contract and tort claims against the tribe that had hired it to construct a casino. That case is inapplicable because it involves general civil claims to which the exhaustion doctrine applies.

> the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . . unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act. . . .

In Produce Magic, Inc., a union asked the Board to negotiate a cession agreement under Section 10(a) in which the Board would cede jurisdiction over certain field employees to the California Agricultural Labor Relations Board (ALRB).[65] Because the Board split evenly on the issue, its prior decision to not enter a cession agreement stood. Members Cohen and Truesdale opposed ceding jurisdiction. They relied on Supreme Court and Board precedent stating that cession is inappropriate where the state or territorial statute is not substantially identical to the NLRA.[66] Because various provisions of the California statute substantially differed from the NLRA, including provisions dealing with voluntary recognition, recognitional picketing, union-security, and secondary boycotts, they concluded that ceding jurisdiction was statutorily precluded.[67]

The analysis applied by Members Cohen and Truesdale in Produce Magic, which examined whether the state or territorial statute substantially differed from the NLRA, clearly represented the weight of Board and court law.[68] Applying that analysis here, it is clear that a cession agreement is inappropriate because the TLRO substantially differs from the NLRA. For example, the TLRO only applies to facilities having 250 or more employees, fails to include

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[65] 318 NLRB 1171, 1171 (1995). In a prior proceeding, the Board already had determined that the employees were not "agricultural laborers" and, therefore, that they were covered by the NLRA.

[66] Id. at 1172.

[67] Id. at 1172 & n.10. Chairman Gould and Member Browning did not want to decide the issue based solely on Board and court precedent. They were of the opinion that the Board should have solicited public comment on the issue through a Federal Register notice. This approach reflected their concern that the proviso to Section 10(a) had become a nullity since the Board had never entered a cession agreement. Id. at 1172.

[68] Id. at 1172, and the cases cited.

a provision similar to 8(a)(3) of the NLRA, and prohibits all picketing on tribal lands. Moreover, apart from this analysis, the Board's decision in San Manuel, which also involved a casino that had adopted the TLRO, clearly shows that the Board believes it, and not some other state or local agency, is statutorily required to regulate the labor relations of Indian casinos.

The Tribe also asserts that the Board should exercise its discretionary jurisdiction under Section 14(c)(1) of the NLRA to decline jurisdiction over this labor dispute. The Tribe relies on New York Racing Assn. v. NLRB[69] to support its position. In that case, the Board promulgated and reaffirmed a rule stating it would not assert jurisdiction over the horse racing and dog racing industries. The Board relied on several factors, including the extensive state regulation of the horse racing and dog racing industries, the relative infrequency of labor disputes in those industries, the sporadic and short-term employment common in those industries, the difficulty such employment patterns pose for effective Board regulation, and its own caseload, in deciding not to assert jurisdiction.[70] The Board concluded that the impact of labor disputes in those industries was minimal and did not warrant Board regulation.[71] Although an employer's association filed suit in federal court challenging the validity of the Board's rule, the Second Circuit held that the Board made a reasoned policy decision under Section 14(c)(1) and that federal courts were without jurisdiction to review the rule.[72]

New York Racing Assn. is not relevant to the current case. Although there the Board concluded that the impact of labor disputes in the horse racing and dog racing industries was minimal and did not require Board regulation, it clearly believes Board jurisdiction is needed over Indian casinos. In San Manuel, the Board devoted considerable discussion to whether policy considerations militated against the exercise of its discretionary jurisdiction over Indian casinos.[73] It concluded that it would not effectuate the policies of the NLRA to exempt a tribal commercial enterprise that

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[69] 708 F.2d 46 (2d Cir. 1983).

[70] Id. at 48.

[71] Id.

[72] Id. at 54.

[73] 341 NLRB No. 138, slip op. 8-9.

substantially affects interstate commerce, employs significant numbers of non-Indians, and that caters to a predominantly non-Indian clientele.[74] It went on to conclude that Board jurisdiction would not interfere with tribal sovereignty because "[r]unning a commercial business is not an expression of sovereignty."[75] Thus, the Board has already fully considered the issue of whether to exercise its discretionary jurisdiction and has decided to assert jurisdiction over Indian casinos.

D. [*FOIA Exemption 5*.]

[*FOIA Exemption 5*

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[*FOIA Exemption 5*

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[*FOIA Exemption 5*

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[74] Id., slip op. at 8.

[75] Id. Cf. Yukon Kuskokwim Health Corp., 341 NLRB No. 139 (May 28, 2004) (exercising its discretionary jurisdiction, Board declined to assert jurisdiction over an Indian health services provider whose patients were almost all Indians; Board declined jurisdiction because of limited impact on interstate commerce and because tribe performed traditional government, rather than commercial, function).

[76] [*FOIA Exemption 5*.]

[77] [*FOIA Exemption 5*.]

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In light of our conclusion that the Board should assert jurisdiction in these cases, the Region should issue complaint, absent settlement.

B.J.K.